INDEX

	Page
Opinions below	2
Jurisdiction	2
Statutes involved	2
Questions presented	2
Statement	3
Summary of argument	7
Argument:	
Introduction	11
I. Fixing the initial price for sales of natural gas to pipelines at the "in-line" price level accords with *CATCO* and the record fully supports the Commission's determination of that level	14
A. Initial price was properly treated by the Commission as the only controversial question remaining for its determination	14
B. The Commission properly found that the public interest required the initial price be set at the in-line level, without consideration of evidence purporting to justify an out-of-line price	16
C. The specific in-line prices on which the Commission conditioned the certificates were fully supported	28
1. The 18.5 cents per Mcf base price is supported by the record	29
2. The 1.5 cents per Mcf allowance for reimbursement of State taxes is supported by the record	35
II. The partial moratorium on price increases imposed by the Commission is a reasonable measure and within its statutory power	36
III. The Commission properly required refunds, with interest, of all amounts collected in excess of the initial in-line price	46

Argument—Continued
A. The Commission had authority to impose a refund obligation 46
B. The Commission properly fixed the measure of refunds as the amount the producers had charged in excess of the appropriate initial price 51
C. The Commission made a reasonable determination as to the rate of interest payable in connection with the refunds 55
Conclusion 59
Appendix A 61
Appendix B 66

CITATIONS

Cases:
Addison v. *Holly Hill Products, Inc.*, 322 U.S. 607 48
Amerada Petroleum Corp., 31 FPC 623, modified, 31 FPC 1315 34
Area Rate Proceeding, Docket No. AR65-2, 29 FPC 223 5
Arizona Grocery Co. v. *Atchison T. & S. F Ry. Co.*, 284 U.S. 370 49
Arkadelphia Milling Co. v. *St. Louis S. W. R. Co.*, 249 U.S. 134 48
California Co., The, 22 FPC 252, rehearing denied, 22 FPC 653, set aside *sub nom. United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, certiorari denied *sub nom. California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881, and *Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 ..... 4, 23, 32, 35
Callery Properties, Inc., et al. v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663, dismissed September 20, 1963 (unreported) 5
Continental Oil Co., 17 FPC 563, modified, 17 FPC 732, reversed, 17 FPC 880, rehearing denied, 18 FPC 169 (order set aside *sub nom. P.S.C. of New York* v. *Federal Power Commission*, 257 F. 2d 717, affirmed on other grounds *sub nom. Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378 ..... 4, 7, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 22, 23, 26, 29, 30, 31, 34, 38, 39, 40, 42, 49, 54, 55.

Cases—Continued

Continental Oil Co., 27 FPC 96, rehearing denied, 27 FPC 592, 28 FPC 1090, petition for review withdrawn January 29, 1963, C.A. 9 No. 18021 (unreported) 19, 30
Delta Air Lines, Inc. v. *Civil Aeronautics Board*, 280 F. 2d 636, certiorari denied, 364 U.S. 870 ..... 49, 51, 55
El Paso Natural Gas Co., 23 FPC 369, affirmed *sub nom. Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149 ..... 19, 56
El Paso Natural Gas Co., 27 FPC 1134 19
El Paso Natural Gas Co., 29 FPC 1175 19
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492 45
Federal Power Commission v. *Hunt*, 376 U.S. 515 ..... 10, 17, 21, 37, 38, 39, 40, 41, 42, 44, 52
Federal Power Commission v. *Southern California Edison Co.*, 376 U.S. 205 28
Federal Power Commission v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 ..... 10, 17, 20
Federal Power Commission v. *Texaco, Inc.*, 377 U.S. 33 ..... 10, 36, 38, 42
International Brotherhood of Operative Potters v. *National Labor Relations Board*, 320 F. 2d 757 57
Kilroy Properties, Inc. v. *Federal Power Commission*, C. A. 5 No. 21029, dismissed March 31, 1963 (unreported) 5, 58
Marshfield Steel Co. v. *National Labor Relations Board*, 324 F. 2d 333 57
Michigan Wisconsin Pipe Line Co., 27 FPC 449 19
Mississippi River Fuel Corp. v. *Federal Power Commission*, 281 F. 2d 919, certiorari denied, 365 U.S. 827 56
National Labor Relations Board v. *Globe Products Corp.*, 322 F. 2d 694 57
National Labor Relations Board v. *Killoren*, 122 F. 2d 609, certiorari denied, 314 U.S. 696 58
Ohio Oil Co., 27 FPC 551, affirmed *sub nom. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 ..... 16, 19, 27, 33, 49
Optical Workers' Union v. *National Labor Relations Board*, 227 F. 2d 687 49

Cases—Continued

Page

Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U.S. 635 45

Permian Basin Area Rate Proceeding, Opinion No. 468, issued August 5, 1965 59

Philip Carey Manufacturing Co. v. *National Labor Relations Board*, 331 F. 2d 720, certiorari denied, 279 U.S. 388 57

Public Service Commission of New York v. *Federal Power Commission*, 287 F. 2d 143 32

Reserve Supply Corp. of L.I., Inc. v. *National Labor Relations Board*, 317 F. 2d 785 57

Revere Copper and Brass, Inc. v. *National Labor Relations Board*, 324 F. 2d 132 57

Royal Indemnity Co. v. *United States*, 313 U.S. 289 57

Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 48

Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 ..... 48, 49, 55

Shell Oil Co. v. *Federal Power Commission*, C.A. 3 No. 14031, dismissed October 2, 1962 (unreported) 5

Skelly Oil Co., 28 FPC 401, modified, 28 FPC 1065, affirmed *sub nom. P.S.C. of New York* v. *Federal Power Commission*, 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* and *Skelly Oil Co.* v. *Federal Power Commission*, 377 U.S. 963 ..... 19, 26, 27, 32, 34, 49

Standard Oil Co. of California, 27 FPC 1153, modified and affirmed 28 FPC 292, affirmed *sub nom. California Oil Co., Western Division* v. *Federal Power Commission*, 315 F. 2d 652 ..... 19, 27, 28

Sun Oil Co., 22 FPC 351, rehearing denied, 22 FPC 654, set aside *sub nom. United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133, certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823 ..... 4, 5, 33

Sunray Mid-Continent Oil Co., 22 FPC 361, rehearing denied, 22 FPC 652, set aside *sub nom. United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 ..... 4, 5, 32

Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 364 U.S. 137 45

Cases—Continued

Page

Superior Oil Co., 22 FPC 369, rehearing denied, 22 FPC 655, set aside *sub nom. United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965 ..... 4, 5, 33

Superior Oil Co. v. *Federal Power Commission*, 322 F. 2d 601, certiorari denied, 377 U.S. 922 36

Texaco, Inc., 28 FPC 247 35

Texaco Seaboard Inc., 29 FPC 593 19

Texas Gas Transmission Corp., 22 FPC 378, rehearing denied, 22 FPC 657, set aside *sub nom. P.S.C. of New York* v. *Federal Power Commission*, 287 F. 2d 146, certiorari denied *sub nom. Hope Natural Gas Co.* v. *P.S.C. of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *P.S.C. of New York*, 365 U.S. 882 ..... 4, 5, 32

Transcontinental Gas Pipe Line Corp., 20 FPC 264, rehearing denied, 20 FPC 571, affirmed *sub nom. United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865, reversed *sub nom. P.S.C. of New York* v. *Federal Power Commission*, 361 U.S. 195. 4, 31

Transcontinental & Western Air v. *Civil Aeronautics Board*, 336 U.S. 601 49

Union Texas Petroleum Co., 32 FPC 254 and 952, petition for review pending *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10 No. 7912 ..... 34, 44, 45

United Gas Improvement Co. v. *Continental Oil Co.*, 381 U.S. 392 28

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 29

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.* 350 U.S. 332 41

United States v. *Morgan*, 307 U.S. 183 48

United States v. *Philmac Mfg. Co.*, 192 F. 2d 517 58

Wisconsin v. *Federal Power Commission*, 373 U.S. 294 .. 22, 59

Statutes, regulations, and rules:

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:

Section 4, 15 U.S.C. 717c 2, 7, 40, 41

Section 4(a), 15 U.S.C. 717c(a) 61

Section 4(b), 15 U.S.C. 717c(b) 61

Statutes, rules, and regulations—Continued Page
Natural Gas Act—Continued
Section 4(c), 15 U.S.C. 717c(c) 61
Section 4(d), 15 U.S.C. 717c(d) 41, 62
Section 4(e), 15 U.S.C. 717c(e) 13, 18, 36, 62
Section 5, 15 U.S.C. 717d 7, 11, 62
Section 5(a), 15 U.S.C. 717d(a) 14
Section 7, 15 U.S.C. 717f 3, 5, 7, 9, 10, 20, 23, 27, 40, 41 52
Section 7(c), 15 U.S.C. 717f(c) 2, 38, 41, 52, 63
Section 7(e), 15 U.S.C. 717f(e) 2, 12, 38, 41, 64
Section 19(b), 15 U.S.C. 717r(b) 2, 45
Federal Power Commission Orders:
Order No. 215–A, 23 FPC 474, 25 Fed. Reg. 1943 58
Order No. 232, 25 FPC 379, 26 Fed. Reg. 1983 36
Order No. 232–A, 25 FPC 609, 26 Fed. Reg. 2850 36
Order No. 242, 27 FPC 339, 27 Fed. Reg. 1356 36
Federal Power Commission Regulations under the Natural Gas Act:
Section 154.91, 18 C.F.R. (Cum. Supp. 1963) 154.91, *et seq.* 36
Federal Power Commission Rules of Practice and Procedure:
Section 2.56, 18 C.F.R. 2.56, 25 Fed. Reg. 13969, General Policy Statement No. 61–1, 24 FPC 818 21
Miscellaneous:
Federal Power Commission Thirty-Ninth Annual Report (1959) 20
Federal Power Commission Forty-Fourth Annual Report (1964) 20
Notice of Proposed Rule-Making, R-199, 26 Fed. Reg. 4615 6

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 21

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., PETITIONERS

v.

CALLERY PROPERTIES, INC., ET AL.

No. 22

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

No. 26

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

No. 32

FEDERAL POWER COMMISSION, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620–642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 (R. 649) and 398A (R. 606), are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were issued on November 6 and 12, 1964, extending the time for filing petitions for writs of certiorari in Nos. 26 and 32 until November 23 and December 12, 1964, respectively. The petitions were filed on November 10 (No. 21), November 12 (No. 22), November 23 (No. 26) and December 11, 1964 (No. 32). Orders were entered granting the petitions in all four cases on March 8, 1965 (R. 645–647). 380 U.S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7 (c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717–717w) are set out in Appendix A, *infra*, pp. 61–65.

QUESTIONS PRESENTED

1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand, profit and market price trends, cost-revenue trends, comparative well costs, etc.) other than that relating to the determination of a price at which the gas can enter the interstate market without disrupting the level of prices in that market?

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's refraining from filing any rate increases above a specified level, fixed to avoid triggering escalations of other prices, during the pendency of the area rate proceeding, but not after July 1, 1967?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an in-line initial price, require that the applicant refund all charges in excess of that price that were previously collected under an earlier unconditioned certificate which had been invalidated on court review?

STATEMENT

In a series of orders issued in 1959, the Commission granted unconditioned certificates of public convenience and necessity authorizing sales by 42 producers of gas in South Louisiana. The contracts,

executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[2] The producers accepted the certificates and, within a short time, commenced deliveries.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[3] but this Court summarily vacated the judgment[4] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York* (*CATCO*), 360 U.S. 378. The other four courts of appeals thereupon reversed similar Commission orders and remanded the proceedings to the Commission.[5]

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[2] *Texas Gas Transmission Corp.* (*Hope Natural Gas Co.*), Opinion No. 327, 22 FPC 378, 386–389, rehearing denied, 22 FPC 657; *The California Co.* (*United Gas Pipe Line Co.*), 22 FPC 252, rehearing denied, 22 FPC 653; *The Superior Oil Co.* (*Transco*), 22 FPC 369, rehearing denied, 22 FPC 655; *Sun Oil Co.* (*United Gas Pipe Line Co.*), 22 FPC 351, rehearing denied, 22 FPC 654; and *Sunray Mid-Continent Oil Co.* (*Transco*), 22 FPC 361, rehearing denied, 22 FPC 652.

[3] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865.

[4] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[5] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York* and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 880 and 882; *United Gas Improvement*

The Commission subsequently instituted an area rate proceeding for Southern Louisiana and consolidated the remanded cases with that proceeding (Docket No. AR61-2, 29 FPC 223, 26 Fed. Reg. 4296, R. 376; see footnote 7 to the opinion below, R. 622). While denying a motion of the consumer intervenors that would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund any amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[7] When it became apparent that decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[8] At the hearing the examiner

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Co. v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147, affirmed *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965. (The cases are fully identified in footnote 6 to the opinion below, R. 621–622.)

[7] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order (*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al.* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[8] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (March 31, 1963).

ruled that the proper standard for determining initial prices that would serve the public convenience and necessity was the general level of prices under contracts roughly contemporaneous with petitioners' and free of the infirmities which had led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

The examiner concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable) and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).[1]

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases that might trigger "favored-nation" clauses in, or occasion price redetermination under, a great many other contracts, the Commission added a condition that imposed a moratorium on all increases to

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[1] He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable (R. 641-642) and it is not here in issue.

any price above 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

The court below held that the Commission erred in conditioning the certificates to an "in-line" price and in refusing to consider the economic evidence proffered by the producers. It further held that, in conditioning the issuance of a certificate, the Commission could impose no moratorium upon a producer's filing of rate increases. Finally, although it sustained the Commission's authority to order refunds, the court ruled that such refunds are to be measured not by the in-line price, but by a "just and reasonable" rate later to be determined in proceedings under Section 4 or 5 of the Act.

SUMMARY OF ARGUMENT

This case presents for the Court's consideration the regulatory program adopted by the Federal Power Commission in response to this Court's admonition in the *CATCO* case (*Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378) that it exercise its conditioning authority under Section 7 of the Natural Gas Act to afford adequate rate protection to the public during the extensive period required to determine just and reasonable prices. The Commission has carried out this assigned task by (1) prescribing that gas may enter the interstate market only at initial prices "in line" with the established prices at which a substantial volume of gas now flowing in the same area was certificated under contem-

poraneous contracts, and (2) proscribing any increased rate filings, for a limited period of time, above the level which the Commission found was the highest which would not trigger widespread escalations under other sales contracts. Through these two types of conditions the Commission has been able to maintain relative price stability while imposing minimal restrictions upon new rate filings.

The court below invalidated both aspects of this protective program. It held that the Commission could not fix initial prices at in-line levels without considering voluminous evidence as to individual producer, area-wide and nation-wide costs, supply and demand, industry trends and prognostications and similar matters—a requirement which would inevitably complicate the process of certification to a point that would render fruitless any effort to fix starting prices prior to the completion of plenary rate proceedings. And the court concluded that the Commission was without any power to condition a permanent certificate upon even a temporary and partial moratorium on the filing of contractually authorized rate increases, regardless of their level or the consequences of their collection. Moreover, while the court agreed that the Commission could require refunds by producers who had been allowed to charge prices above the proper initial rate level pursuant to certificates set aside on timely appeal, it declared that such refunds should be measured not against the proper initial price determined in the certificate proceeding but against the just and reasonable rate level to be subsequently determined.

1. Under the Commission's decision, producers are free to file contractually authorized increases (subject to the 23.55¢ "anti-triggering" ceiling) and to collect such higher rates (subject to refund) after the six months' notice and suspension period provided by Section 4 of the Act. The Commission, for its part, has determined that the public convenience and necessity require the producers to take the risk that any such increases above the in-line level will subsequently be held to be unjustified, and, if so, to make refunds with interest. *CATCO* made clear that the agency is not required to convert Section 7 certification proceedings into full dress rate cases. The administrative decision thus heeds the teaching of *CATCO* in holding the line pending the determination of just and reasonable rates and in preventing certificate proceedings from becoming bogged down by the consideration of evidence even more voluminous than would be relevant in rate proceedings. By its approach, the Commission provides consumers interim protection and makes its personnel and facilities available for reaching a long range solution through determination of just and reasonable rates, while imposing minimal and temporary restrictions on the producers' freedom to file rate changes.

The in-line price determination involved in this proceeding—18.5¢ per Mcf, plus 1.5¢ for tax reimbursement where appropriate—was clearly justified by the record. None of the sales certificated during the relevant period at any higher price were shown to be free of the defects condemned in *CATCO* and such higher prices were properly discounted by the Com-

mission as suspect pursuant to the uniform directives of the courts which had remanded these cases.

2. This Court's decisions in *CATCO, Federal Power Commission* v. *Hunt,* 376 U.S. 515, and *Federal Power Commission* v. *Texaco Inc.,* 377 U.S. 33, establish that the Commission, acting under Section 7 of the Act, had authority to condition the certificates which it tendered upon the producers' foregoing increases which would otherwise be authorized by their contracts. Nothing in *Hunt* limits this authority to temporary authorizations, and the *CATCO* and *Texaco* cases, both of which involved permanent certificates, argue against any such limitation. Moreover, in view of the danger, recognized by this Court in both *CATCO* and *Hunt,* that the mere charging of rates which could cause widespread triggering could permanently disrupt the rate structure and the admitted inadequacy of the refund remedy for consumer protection (see *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145), the Commission properly determined that charging any price above the 23.55¢ should not be permitted for the prescribed interim period.

3. The lower court properly rejected the contention that ordering the producers to make refunds to their customers of the excessive sums collected under their original certificates (certificates invalidated on review) constituted the award of reparations. The refund order restored the situation as closely as possible to what would have prevailed without the Commission's original error. Moreover, since the producers com-

menced service with full knowledge that the certificate prices were being challenged, they cannot claim a right to rely on them.

The lower court, however, improperly held that the Commission could not fix the measure of refunds at the difference between what the producers had been charging and the proper certificate price. The Commission's order merely placed upon the producers the burden which they assumed when they commenced operations under certificates still subject to challenge.

ARGUMENT

INTRODUCTION

In *CATCO*,* this Court, stressing the underlying purpose of the Natural Gas Act "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" (360 U.S. at 388), held that the Commission could not simply permit gas to be sold in the interstate market at the producer's contract price pending determination of just and reasonable rates under Section 5 of the Act where the collection of the proposed contract price during the protracted waiting period would adversely affect the public interest. "Where the application [for a certificate of public convenience and necessity to sell gas to an interstate pipeline] on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest," an unconditioned grant of the certificate application ought not be made (*id.* at 391). The Court indicated,

* *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378.

however, that in such circumstances the Commission's power to attach conditions under Section 7(e) of the Act provides an alternative to denial of a certificate (*ibid.*):

> * * * Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

In keeping with this mandate, the Commission imposed two conditions on the certificates granted in the present cases: (1) that the producers commence service at the 18.5 cents* (per Mcf) price that the Commission found to be "in line" with prices for Commission-certificated sales of gas from the Southern Louisiana production area under generally contemporaneous contracts; and (2) that, until just and reasonable area rates are determined for Southern Louisiana, or until July 1, 1967, whichever is earlier, the producers shall not file any increased rates above 23.55 cents, the level at which rate filings could trigger increased rates by other producers under the escalation provisions of their contracts with the three pipeline customers here involved.

The court below held both of these conditions invalid. It ruled that the Commission could not limit the producers to an initial in-line price—at least not

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* Plus 1.5 cents per Mcf for partial reimbursement of State taxes where applicable.

without first considering a mass of information which would have encompassed as much material as would be required to determine the just and reasonable price for the gas. It also concluded that the Commission had no power to place any upper limit on the rates for which a producer might file in a prescribed future period."

The court below did uphold the Commission's power to order the producers to make refunds for the preceding period, during which they had been operating under the terms of certificates invalidated on previous appeals. But that ruling was qualified by the court's holding that the measure of these refunds was not to be the difference between the in-line price and the contract prices originally certificated (as the Commission had determined) but was to be based upon the just and reasonable price to be subsequently fixed.

The court has thus converted a procedure calculated to provide essential interim protection to consumer and producer alike into one that could not be completed in advance of full-blown rate proceedings. The result, we urge, falls short of the degree of consumer protection deemed necessary by the Commission and is not consonant with the Act or the decisions of this Court.

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[*] As the Court is aware, the Commission's power to suspend a filed rate is limited to a period of five months beyond the initial 30-day notice period. Section 4(e).

I. FIXING THE INITIAL PRICE FOR SALES OF NATURAL GAS TO PIPELINES AT THE "IN-LINE" PRICE LEVEL ACCORDS WITH *CATCO* AND THE RECORD FULLY SUPPORTS THE COMMISSION'S DETERMINATION OF THAT LEVEL

A. INITIAL PRICE WAS PROPERLY TREATED BY THE COMMISSION AS THE ONLY CONTROVERSIAL QUESTION REMAINING FOR ITS DETERMINATION

From the beginning of these cases there was no question that this gas was needed in the interstate market, that the reserves were adequate to warrant institution of the service, and that the producer applicants were able and willing to perform the services. The only point in issue at any time, before the Commission or in the courts, was whether it would be consistent with the public interest to permit the gas to enter the market under the price provisions of the contracts.

The burden of *CATCO* was that the Commission, in that case, had not given sufficient consideration to price in appraising the public convenience and necessity. Although the Commission had originally concluded that the *CATCO* "sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (*Continental Oil Co.*, 17 FPC 563, 575), it finally issued the certificates at the contract price which it had previously found too high. It did so because it thought the public interest in having the gas brought into the interstate market outweighed the possibility, if not the probability, that the gas would be sold at an unreasonably high price during the period before a Section 5(a) rate case could be completed. This Court

held that the Commission erred in giving the other elements of the public interest controlling weight so as to undermine "[t]he overriding intent of the Congress to give full protective coverage to the consumer as to price" (*CATCO*, 360 U.S. at 389).

Neither the fact that new supplies of gas are constantly needed in the interstate market to replace the gas being drawn from the ground and to provide essential reserves for the new consumers always being added, nor the fact that the pipelines and consumers may be willing—or economically compelled—to pay the prices demanded therefor by the producers, is sufficient to establish that the public interest would be served by a sale at the producer-proposed price. It is the Commission's function to "hold the line" pending ultimate determination of just and reasonable prices. For the agency to certificate sales at ever higher prices simply because the producers insisted on them, the Court indicated in *CATCO*, would frustrate the scheme of regulation. Thus, when the Commission, following the admonition in *CATCO*, conditioned the present certificates to an initial "public interest" price, it did not, as the court below held, make price the sole consideration; it simply held that, although it had been shown that there was a need for the gas involved and that the producers were able and willing to meet that need, the public interest would not be served if the gas were to enter the market at contract prices in excess of the in-line price for other new gas entering the interstate market in the particular pricing area at the same time. Price was the issue on which all these cases had been remanded

to the Commission and the sole issue remaining in controversy. *Cf. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677, 680 (C.A.D.C.).

B. THE COMMISSION PROPERLY FOUND THAT THE PUBLIC INTEREST REQUIRED THE INITIAL PRICE TO BE SET AT THE IN-LINE LEVEL, WITHOUT CONSIDERATION OF EVIDENCE PURPORTING TO JUSTIFY AN OUT-OF-LINE PRICE

As indicated immediately above, the Commission held that the public interest would not be served by a grant of these certificates if the initial price to be charged by the producers was fixed at a price out of line with that charged for other new gas coming into the market during the same period in Southern Louisiana. The court below held that, before reaching this conclusion, the Commission was required to consider masses of evidence it had excluded as irrelevant. It did not rule that this evidence was in fact relevant in fixing the in-line price. Rather, it held that the Commission could not set the initial certificate price at any in-line level below a producer's contract rate unless the producer was first given the right to introduce evidence purporting to demonstrate that a higher price was demanded by the public interest.

In response, we undertake to show that the Commission's program and method of controlling initial price are reasonable and necessary; that the cases do not support the conclusion that expanded proceedings of the kind contemplated by the court below are required; and that the imposition of the Fifth Circuit's new rule would hopelessly clog the administration of the Act.

1. The Commission has determined that the public interest will not be adequately protected by authorizing producers to commence sales at their contract prices, subject to later refund should the just and reasonable price be found to be lower. As this Court recognized in *CATCO* (380 U.S. at 390) and reemphasized in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524, the mere charging of an out-of-line price, even though it is subject to refund, can have permanent and adverse effects upon the general price level. In addition, as this Court observed in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, and reiterated in *Hunt* (pp. 524–525), the refund procedure, in any event, is by no means adequate in providing full protection to the consumer who pays the high rate.

To cure these defects the Commission here prescribed a two part remedy. At the upper end of the price spectrum, it placed a temporary moratorium on any increased rate filings at or above the probable triggering level. The validity of this action is discussed in Part II of this brief, *infra*. In addition, it concluded that the initial price at which gas would be certificated to enter the market would be the in-line level, *i.e.*, the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous certificates not themselves subject to court review or otherwise suspect.

The latter step has importance for producers as well as consumers. The initial certificate price constitutes a firm price at which producers can continue

to operate pending the determination of just and reasonable rates without any contingent obligation to make refunds should the just and reasonable price later turn out to be at a lower level. For very sound economic reasons, many producers wish to commence service at a firm price rather than run the risk of the indefinite and potentially large refund obligations which could result if they were certificated at contract rates subject to a refund condition should these rates ultimately prove unjustified. If they know the price is free and clear, they can release funds for operational purposes, make necessary payments to royalty owners (who often are entitled to a percentage of the sales price) and meet their obligations under State taxing statutes (which in many areas are calculated at a percentage of producer revenues).

The Commission's policy adopted here permits the producers, upon acceptance of their certificates at the in-line price, to file immediately for any contractually authorized prices within the limits of the triggering moratorium. If they do so, they may place the higher rates into effect after the statutory thirty-day notice period and the expiration of the five months' maximum suspension period (see Natural Gas Act, Section 4(e)). This does not mean, however, that setting the price at the in-line level is without effect in achieving the *CATCO* objective. In the first place, the statutory power to delay rate increases above the in-line level for six months is of more than negligible significance. Equally important, experience has shown that, once the firm initial price has been set at the

level provided by the in-line standard, many producers—those who would not want to run the risk of later being obligated to make substantial refunds (plus interest)—will continue to operate at this figure. In fact, the vast majority of producers whose initial rates have been set at in-line price levels have voluntarily chosen to continue operating at that level despite contractual and certificate authority to file for higher figures."

This, of course, has the effect not only of keeping the general price level relatively constant, pending the

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"Thus in the nine in-line determinations made prior to the present opinion, of a total of 87 sales whose initial price was set below contract levels, only 13 have subsequently filed for higher rates, either to the original contract level or to take advantage of periodic escalations subsequently coming due. The nine proceedings are *El Paso Natural Gas Co., et al.*, Opinion No. 335, 23 FPC 369, affirmed *sub nom. Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (C.A.5) (Aneth Field); *Continental Oil Co., et al.*, Opinion No. 351, 27 FPC 96 (*CATCO* on remand); *Michigan Wisconsin Pipe Line Co., et al.*, Opinion No. 353, 27 FPC 449 (Oklahoma); *Ohio Oil Co., et al.* (no opinion), 27 FPC 551, affirmed *sub nom. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.), *supra* (North Louisiana); *El Paso Natural Gas Co., et al.*, Opinion 358, 27 FPC 1134 (Wyoming); *Standard Oil Co. of California, et al.*, Opinion No. 359, 27 FPC 1153, affirmed *sub nom. California Oil Co.* v. *Federal Power Commission*, 315 F. 2d 652 (C.A.10) (Utah); *Skelly Oil Co., et al.*, Opinion No. 362, 28 FPC 401, affirmed *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), certiorari denied, *sub nom. Prado Oil & Gas Co. and Skelly Oil Co., et al.*, v. *F.P.C.*, 377 U.S. 963 (Texas RR District 4); *Texaco Seaboard Inc., et al.*, Opinion No. 383, 29 FPC 593 (Texas RR Districts 3 and 4); *El Paso Natural Gas Co., et al.*, Opinion No. 390, 29 FPC 1175 (Oklahoma Panhandle).

area rate determination,[12] but also of avoiding, in large part, the inadequacies of the refund procedure. See *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145. It has also had the incidental, but important, effect of helping to reduce the Commission's backlog of pending certificate applications to a new six-year low of 1,401 as of June 30, 1964, down almost 1,000 from the 2,390 pending on June 30, 1959, at the time of the *CATCO* decision. Compare Thirty-Ninth Annual Report, Federal Power Commission, 1959, p. 76, with Forty-Fourth Annual Report, Federal Power Commission, 1964, p. 146.[13]

What respondents are seeking, in attempting to introduce evidence to show that the initial prices should be fixed at higher than in-line levels, is not the right to file for and charge higher prices but the privilege of doing so without the risk of being subject to refund obligations. Even if the administrative problems inherent in any attempt to go beyond data as to comparable contemporaneous sales were not of extraordinary magnitude, the Commission could properly determine under Section 7 of the Act that adequate protection to the public interest requires that gas not enter the interstate market at prices higher than exist-

[12] We have set out an Appendix B, *infra*, p. 66, a chart showing how the field prices of natural gas have leveled off during the period in which initial prices have been consistently fixed at the in-line price.

[13] Commission figures for the fiscal year ending June 30, 1965, not yet published, indicate an even greater reduction in the backlog bringing the number of pending producer certificate applications on hand as of this later date down to 1,094.

ing levels. In fact, however, any requirement that the Commission consider evidence of the type and mass involved here, would, in practical effect, render nugatory any effort to fix initial prices prior to the just and reasonable rate determinations."[14]

We emphasize that what is in issue here is the establishment of a viable interim system which will protect the public against a run-away gas price structure while the basic just and reasonable prices are being fixed through the area rate proceedings now in various stages before the Commission.[15] When such just and reasonable prices have been determined, the initial

[14] It may be questioned whether even respondents would be so eager to extend the present proceeding to consider the voluminous excluded evidence were they not presently operating at the high prices originally set in the voided certificates. It is certain that most producers (as well as the piplines and their customers) could not await such a prolonged proceeding before commencing service. And while under such circumstances service might commence under temporary authorizations set at "guideline" prices fixed *ex parte* by the Commission, both producers and consumers are entitled to a prompt hearing to show that such prices are below or above the proper in-line level.

[15] The Commission's decision in the Permian Basin area rate proceeding (AR61–1), involving approximately 11% of the gas coming into interstate commerce, was issued on August 5, 1965. The Southern Louisiana case (AR61–2) is well along towards completion of the hearing stage of the proceeding, and direct evidence has already been submitted in two other proceedings involving the Hugoton-Anadarko basins of Kansas, Oklahoma, and Texas (AR64–1) and the Texas Gulf Coast areas (AR64–2) in which formal hearings are scheduled to start on September 14, 1965. These four proceedings cover 11 of the 23 pricing areas established by the Commission in its 1960 Statement of Policy (25 Fed. Reg. 18969, 18 C.F.R. 2.56) and approximately 80% of all gas flowing in interstate commerce.

price problem in gas certification proceedings will be far less critical. The area rates will obviously provide a standard of reference by which to appraise the prices at which new gas should be introduced into the market. For the present, however, it would be a grave loss if the Commission were required to divert its available manpower and resources to consider evidence purporting to show that some producers should be permitted to enter the interstate market at prices higher than the in-line level at which substantial amounts of gas are in fact entering that market. Compare *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 313–314.

2. In support of its holding that everything proffered in the way of evidence to justify an initial price above the in-line level must be admitted and considered, the court below relies primarily upon this Court's opinion in *CATCO*—in particular, the language noting that the producers there had not introduced evidence to show the "relative costs of production" in the off-shore production area involved and another off-shore area where the going prices were lower, nor any "reason why" the proposed price was some 70% higher than the pipeline's weighted average cost of gas (360 U.S. 392–393). The fact, however, is that *CATCO* merely held that there was an insufficient evidentiary basis for certificating the *CATCO* producers at a firm price 4.4 cents above that which the Commission had earlier found was the highest justified by the public interest (see *CATCO*, 360 U.S. at 386); the Court did not indicate that the

Commission must permit evidence before it can set the initial price at prevailing levels."[16]

The discussion in *CATCO*, it should be further noted, was made in the context of fixing the initial price for a new production area from which no previous sales had been made. As the Ninth Circuit suggested in *United Gas Improvement Co.* v. *Federal Power Commission, supra,* n. 4, p. 4, 283 F. 2d 817, 823, "Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, * * * relative production costs, need, competition between pipeline companies, and no doubt other factors become significant." The portion of the *CATCO* opinion directly following the language relied upon by the lower court (R. 627) makes clear that even in such situations the most compelling evidence is that showing the relationship of the proposed price to other prices being paid by the pipeline in adjacent areas. See 360 U.S. at 393.

3. Although it verbally acknowledges this Court's admonition that Section 7 proceedings should not be extended, full-dress rate hearings, the court below proceeds to hold that in the present cases the Commission was required to receive and evaluate not only all the cost-of-service evidence which would have sufficed in individual rate proceedings for each of the 16 producers (but which might not be appropriate

[16] This is equally true with respect to the dicta in the various court of appeals cases cited by the lower court, all of which similarly appeared in decisions rejecting Commission certificates issued at prices greatly in excess of the in-line price.

in the pending area rate cases), but also a great mass of additional evidence of a general nature—evidence of the type which might be relevant to proceedings instituted to fix just and reasonable area rates.[17] The implications of the holding below can best be seen by the court's own summary of the proffered evidence which it held the Commission was required to admit and evaluate (R. 623-624):

> * * * At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas

[17] *Cf. ODECO's* argument in its brief in opposition to certiorari (p. 11) to the effect that the mass of individual cost data here tendered should have been admitted because "if not received in certificate proceedings, evidence relating to individual circumstances will never be heard in any proceeding before the Commission." Whether this is so or not, it would be strange indeed to hold that cost data must be considered in a certificate proceeding *because* they were not necessary in a rate proceeding.

is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

The offer of proof alone, without cross examination or rebuttal evidence, covered some 2,000 pages in the record.

At another point (R. 629) the court appears to suggest a virtually unlimited number of additional subsidiary or tangential factual questions, such as population growth and industrial expansion in various areas, which might properly be explored in determining the initial prices at which producers' sales

may be certificated. These questions apparently are expected to set off a chain reaction of additional subsidiary questions."

The decision to exclude evidence of the kind proffered here was not arrived at suddenly. It grew out of repeated consideration of the problem in case after case arising since *CATCO*. In the earlier cases such evidence was admitted. But accumulating experience led to a recognition that it was not material to the purpose at hand. The turning point came in *Skelly Oil Co., supra,* at 28 FPC 406–413, affirmed *sub nom. Public Service Commission of New York* v. *Federal Power Commission, supra,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963. There, holding that the initial price should be determined by the in-line

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[18] That the opinion below necessarily entails a mammoth proceeding is emphasized by its "distinction" of the District of Columbia Circuit's decision in the *Skelly* case (*Public Service Commission of New York* v. *Federal Power Commission, supra,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil and Gas Co.* and *Skelly Oil Co.* v. *Federal Power Commission,* 377 U.S. 963), which had sustained the Commission's ruling that cost and other economic data tendered by producer applicants were irrelevant to a determination of a proper initial price condition in a certificate. *Skelly Oil Co.,* 28 FPC 401, 411, modified, 28 FPC 1065. The court's comment is that (R. 632, n. 32) "The evidence relating to cash outflow and replacement cost proffered and rejected in [*Skelly*] was much more limited than that here." Thus, while stating that "there need not be a full dress § 4 or § 5 rate hearing" (R. 632) and expressing confidence that "with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing" (R. 631–632), the court has ruled in effect that the more voluminous the evidence tendered, the stronger the Commission's obligation to receive, consider and evaluate it.

price in the area at the time the contract in issue was executed, the Commission discussed the evidence as to the in-line price, described the other economic and financial evidence that had been introduced and the arguments based thereon, and then stated its reasons for concluding that such evidence was not necessary or appropriate, was of limited utility, and would lead to complicated, long-drawn-out proceedings.

In affirming, the Court of Appeals, speaking through Judge Fahy, stated (329 F. 2d at 246–247):

> * * * [T]hese are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United Gas Improvement Co.* v. *FPC, supra,* 283 F. 2d at 823. Consideration of the proffered evidence was not essential. * * *[10]

A similar view was expressed by the Tenth Circuit in *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652, 659. It stated that,

[10] See, also, the same court's prior opinion in *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 316 F. 2d at 680.

even in dealing with a new marketing area where comparable prices were not available, it was doubtful that

> * * * costs * * * are relevant at all in determining the "in line" price in a Section 7 proceeding. * * *

It observed further (315 F. 2d at 660):

> We do not think that the Commission was required in this case to consider the exploration and drilling costs or the cost of delivery services in arriving at the "in line" price in a certification proceeding. The consideration of these matters may properly be left to a Section 4 proceeding.

We submit that the Commission acted well within its powers in undertaking to fix the "in-line" initial price on the basis of the price level established by comparable sales in the area.

C. THE SPECIFIC IN-LINE PRICES ON WHICH THE COMMISSION CONDITIONED THE CERTIFICATES WERE FULLY SUPPORTED

Because the court below rejected the Commission's "in-line" standard for determining initial producer rates as a matter of law, it did not reach respondent's further contention that the specific initial price prescribed, 18.5 cents per Mcf (plus 1.5 cents per Mcf tax reimbursement where applicable), was unsupported by the record. Nonetheless, we believe that the circumstances of the present case warrant this Court's resolution of this issue at the present time, without remand to the court below for initial consideration. Compare *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404–405; *Federal Power*

Commission v. *Southern California Edison Co.*, 376 U.S. 205; and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 114.

The present cases have been pending since 1957 and 1958, when the applications for certificates were filed (R. 537–540, 552–553). During that time they have gone through the Commission and the courts twice. They involve issues at the core of the Commission's entire program for interim regulation of natural gas producers. Since the Commission has applied, and is continuing to apply, the principles here under attack in numerous other cases, it is highly desirable that a definitive ruling be secured at the earliest possible time. In addition, the Commission's orders have been stayed pending completion of judicial review (R. 616). Accordingly, the delay inherent in a remand to the court of appeals, with probable petitions for certiorari to review the decision on remand, will further postpone any relief to which consumers are held entitled. Finally, the question presented is purely one of law since the relevant evidence is uncontradicted.

I. *The 18.5 cents per Mcf base price is supported by the record*

As previously stated, the standard adopted for the initial certificate price is the general level of prices in the area of sale at the time the applicants' contracts were made. In *CATCO*, on remand, the Commission ruled that, in determining the prevailing price level in Southern Louisiana, no weight should be given to the contract prices originally certificated in *CATCO*. Similarly, the Commission ruled out all

other prices certificated during the original *CATCO* period at prices equal to or higher than the unsupported *CATCO* level. *Continental Oil Co.*, 27 FPC 96 and 592.[20] On the basis of the remaining "non-suspect" contract prices under which gas had started flowing from the Southern Louisiana area, the Commission concluded that the proper in-line prices for the *CATCO* sales were 18.5 cents per Mcf (for off-shore gas), with an additional 1.5 cents per Mcf for reimbursement of State taxes where applicable.

In the present cases, the examiner, rejecting a suggestion that the Commission's *CATCO* decision on remand be taken as conclusive of the proper initial price for sales instituted a year or so later (R. 494), received and independently evaluated (R. 502–507) the evidence of prevailing price submitted by some of the applicants (R. 506–507). Following the principles enunciated by the Commission in *CATCO* on remand, the examiner eliminated the original *CATCO* contracts and other contracts at prices equal to or higher than the *CATCO* level. These "suspect" contracts aside, the applicants' price evidence (Ex. 42, Sch. 3 and 4, R. 292–293) showed, as summarized by the examiner and the Commission (R. 558):

> * * * that there were 47 contracts executed in 1957 with volumes of 56,500 Mmcf and 59 contracts executed in 1958 with volumes of 70,500 Mmcf at initial prices of 18.5 cents or less. Also, out of a total of 1958 deliveries of

[20] The subsequent settlement (28 FPC 1090), which did not affect the 18.5 cents rate fixed, resulted in withdrawal of the petitions that had been filed for review of the Commission's order.

> 241,200 Mmcf from Southern Louisiana under contracts made prior to the initial erroneous CATCO order, only 63,900 Mmcf was sold at prices above 18 cents. * * * [Footnote omitted.]

The evidence was uncontradicted, the specific finding undisputed, and the only question is whether the Commission acted improperly in fixing the in-line price at the highest level remaining after eliminating from its consideration the unsupported *CATCO* prices and similar prices obviously influenced by the Commission's earlier erroneous certification of the *CATCO* contracts.

We submit that the Commission's action is supported, if not indeed required, by prior decisions of this Court. A major reason for this Court's condemnation of the Commission's original order in *CATCO* was its prediction (360 U.S. at 390) that if the Commission's certification were to stand "[t]he price certificated [would] in effect become the floor for future contracts in the area." Shortly thereafter, the Third Circuit in effect accepted as irreversible the new high price plateau permitted by the Commission's prior erroneous issuance of unconditioned certificates. *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865, affirming *Transcontinental Gas Pipe Line Corp.*, 20 FPC 264 and 571. But this Court summarily vacated that judgment and ordered the case remanded to the Commission for further consideration in the light of *CATCO*. *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195. The necessary implication of these decisions is that the

price plateau created by the erroneously certificated *CATCO* contracts could not be taken as indicative of the initial price to be established in the public interest. The Commission must take steps to undo any harm caused by its original erroneous action.

This view of the Commission's duty was explicitly adopted by the courts of appeals in the decisions remanding the instant cases to the Commission. For example, in *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881, the Ninth Circuit held that certificated prices then in litigation should be disregarded, and added (p. 824):

> We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. * * *

Shortly thereafter the District of Columbia Circuit expressly approved this view (*Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 149, n. 3), declaring (p. 149) that "Where the inquiry is whether a particular proposed price is inflated, it serves no purpose to refer to other prices which may be equally inflated." See also *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.); *United Gas Improvement Co.* v. *Federal Power Commission*, *supra*, n. 4, p. 5, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom.*

Sun Oil Co. v. *United Gas Improvement Co.*, 368 U.S. 823; and *id.*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965. The Commission should not grant unconditioned certificates simply because the contract prices "had been bargained for at arm's length, or [because] they were not higher than a price someone else was then paying the area" (290 F. 2d at p. 136). As Judge Wright subsequently stated in *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 316 F. 2d at 680, n. 12, these cases teach that, in determining the price line to be held, "sales subject to litigation before the Commission or in court, and all sales similar to such sales, are suspect."

The court below apparently disapproved the Commission's method in the present cases because the 18.5 cents per Mcf price "was actually a 1956 level" (R. 630, n. 23) and the court deemed it "inconceivable that Congress meant to freeze the rates to 1956-58, or to any other particular time for that matter" (R. 630, footnotes omitted).

The court below erred, however, in construing the Commission's action as a rigid freeze of prices. The contracts here involved were all made in 1957 or 1958 and, as indicated *supra,* paramount weight was given to the price structure during those years. That the in-line price for sales in the later period was ultimately determined to be the same as in 1956 is due to the fact that the contracts made at higher prices during 1957 and 1958 were not shown to be free of the improper influence of the original certificates in *CATCO.*

This does not mean that the in-line price line, once fixed, is necessarily inflexible. On the contrary, in the subsequent *Amerada* decision, involving Texas Railroad District 4 (*Amerada Petroleum Corp.*, 31 FPC 623 and 1315, pending upon petitions for review) the Commission found that the in-line price for that production area was 16 cents for the period between September 28, 1960, and August 30, 1962, although it had already concluded that the in-line price for the previous period was only 15 cents (see *Skelly Oil Co., supra,* 28 FPC 401 and 1065). Of course, whether a price line will change, and if so in what direction, will necessarily depend upon the facts relevant to each area. Since the decision here under review, the Commission has concluded that the line in the Southern Louisiana Area here in issue not only did not change between 1956 (the time of the *CATCO* contracts) and 1957–1958 (the time of the present contracts) but remained constant through the end of 1962 (*Union Texas Petroleum Co.*, 32 FPC 254 and 952, pending upon petition for review *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10 No. 7912).

We accordingly submit that the Commission properly exercised its discretion when, in determining the in-line price for the sales here in question, it declined to give weight to certificated prices that had been set aside by the courts, were being litigated, or were not clearly shown to have been uninfluenced by such "suspect" prices.

2. *The 1.5 cents per Mcf allowance for reimbursement of State taxes is supported by the record*

In its remand opinion, the Ninth Circuit expressly held that the Commission was obliged to consider the total price paid for the gas and that it was an abuse of discretion for the Commission to look only to the base price without regard to any added cost for tax reimbursement. *United Gas Improvement Co.* v. *Federal Power Commission, supra,* 283 F. 2d at 825. In Judge Hamley's words "tax reimbursement is an item for bargaining between producer and pipeline company." The evidence in this case corroborates the court's statement, showing tax reimbursement ranging from zero to 100% of the tax (Ex. 42, Sch. 6, R. 296). In settlements reached in several of the remanded Southern Louisiana cases, the producers reserved the right to file for reimbursement of only 50% of any federal severance tax which might later be imposed on off-shore gas. *Texaco Inc.,* 28 FPC 247, 248. The 1.5 cents per Mcf here allowed by the Commission amounts to approximately 65% of the present 2.3 cents per Mcf State tax. It is the amount of tax reimbursement provided in 43 contracts made in 1957 and 1958 (with one contract providing for no tax reimbursement and one calling for 1.3 cents per Mcf) (Ex. 42, Sch. 6, R. 296).

On this evidence, it cannot be said that the Commission's allowance was arbitrary or capricious. So long as a very substantial number of producers were freely contracting at that figure, it was clearly within the zone of reasonableness. There is no requirement that the Commission allow the highest price con-

tracted for or the average price, or adopt any other mathematically precise measure.

II. THE PARTIAL MORATORIUM ON PRICE INCREASES IMPOSED BY THE COMMISSION IS A REASONABLE MEASURE AND WITHIN ITS STATUTORY POWER

As already elaborated, the present cases concern the Commission's responsibility to afford consumers adequate protection against excessive prices while just and reasonable rates are being determined. The Commission met this responsibility in part by fixing at the "in-line" level the initial prices at which gas may enter the interstate market. But the Commission determined (R. 578) that this condition, standing alone, was not sufficient and that it could not adequately "hold the line" if producers were free to file any contractually authorized increases, no matter how high, and put them into effect in six months (the thirty-day notice period plus the maximum period of suspension under Section 4(e)). Explaining (R. 578) that any price in excess of 23.55¢ per Mcf might trigger increases and call for price redeterminations under the applicable contracts of the respondents' pipeline customers,[21] it conditioned the

[21] While present Commission regulations now outlaw most types of indefinite escalation clauses for the future (Order No. 232, 25 FPC 379, 26 Fed. Reg. 1983, as amended by Order No. 232–A, 25 FPC 609, 26 Fed. Reg. 2850; Order No. 242, 27 FPC 339, 27 Fed. Reg. 1356; Regulation, § 154.91, *et seq.*, as amended, 18 C.F.R. (Cum. Supp. 1963) § 154.91, *et seq.*; see *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33; *Superior Oil Co.* v. *Federal Power Commission*, 322 F. 2d 601 (CA9) certiorari denied, 377 U.S. 922), much gas is still being sold under long term contracts containing indefinite escalation clauses made and certificated before Orders Nos. 232 and 242 were issued.

grant of the instant certificates so as to preclude any filings of increases above that figure until a final decision in the pending Southern Louisiana Area Rate Proceeding (AR61–2), or until July 1, 1967, whichever is earlier. In adopting this measure, the Commission was dealing with practical necessities of the same kind described by this Court in *Federal Power Commission* v. *Hunt, supra,* at 524:

> [N]or is it any answer to say that the suspension power under § 4(e) will afford protection to the public. The experience since [*CATCO*] indicates that a triggering of price rises often results from the out-of-line initial pricing of certificated gas. These effects become irreversible and splash over into intrastate sales, thus generating reciprocal pressures that directly affect jurisdictional rates. As we said in *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 154, 155 (1962), the possibility of refund does not afford sufficient protection: * * *

Without questioning the Commission's finding that filing above this ceiling might have the consequences feared, the court below concluded that, "no matter how commendable that policy may be," the Commission was without statutory authority to accomplish it (R. 636). In the court's opinion, the statutory scheme gives a natural gas company an absolute right to file any contractually authorized rate increases and collect them subject to refund after the end of the suspension period.

A. We disagree, and submit that the Commission's power to condition a certificate by a provision that

there be a moratorium upon price changes is sustained by this Court's decisions in *CATCO, Hunt,* and *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33.

Sections 7 (c) and (e) of the Natural Gas Act impose upon the Commission the duty to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate commerce. The Commission can do this by denying a certificate for a sale which, for any reason (including price), is not required by the public convenience and necessity. Alternatively, it may authorize the sale subject to conditions. In following the latter course, the only limitation stated in the statute is that the Commission shall confine itself to "such reasonable terms and conditions as the public convenience and necessity may require."

In *CATCO,* the Court concluded that where a proposed price might result in triggering of general price rises the Commission should impose appropriate conditions upon the granting of permanent certificates in order to protect the public interest. Although it did not discuss the type of condition imposed in the instant case, there is nothing in the *CATCO* opinion confining the Commission to conditions prescribing initial prices. The essential point is that the Commission's conditioning power should be used to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," since the "overriding intent of the Congress [is] to give full protective coverage to the consumer as to price * * *." 360 U.S. at 388–389.

In *Hunt*, the Court upheld a condition which specifically forbade a change of rates. The authorization to the producer was a temporary one and it prohibited the filing of any rate increases during the pendency of the proceeding on the permanent certificate. The court below read the *Hunt* decision as limited in applicability to temporary authorizations. But no such limitation is warranted. Significantly, the *Hunt* opinion, referring to the prior *CATCO* opinion, which involved *permanent* certificates issued after hearing,[22] rests the decision on the statutory power to condition such certificates, saying (376 U.S. at 523):

> * * * There we indicated that the Commission might avail itself of its power to condition the initial certification of natural gas into interstate commerce in order to prevent a triggering of general price rises. * * *

[22] The court below treats this language as applying only to temporary certificates because it was introduced by the sentence "[T]his Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra* [*CATCO*]." This it takes as indicating that "some of the more sweeping statements made in Catco where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates." (R. 634–635, emphasis the court's). We think it clear that in *CATCO* this Court was well aware that it was talking of the protections required in the permanent certification of sales of gas and that its reference in *Hunt* to the "temporary certificate procedure" in *CATCO* was to the fact that the particular price conditions which the Court indicated in *CATCO* were necessary to protect the public interest were conditions to hold the line *temporarily* until the just and reasonable price could be fixed. The conditions in issue here are, of course, just such "temporary" conditions—doubly assured in that, by their terms, they expire in July 1, 1967, even if the appropriate area rate case has not been concluded by that date.

To be sure, there are significant differences between temporary authorizations and permanent certificates. The former are issued *ex parte* in order to take care of emergencies, and no hearing is held; the latter are granted only after provisions for notice and hearing have been satisfied. The former are issued pending disposition of application for permanent authority; the latter provide authority of long duration. The reasonableness of the condition obviously depends upon the situation to which it is addressed and the Court quite aptly observed in *Hunt* that it was not passing on "the extent of [the conditioning] power in permanent certification" (376 U.S. at 526). Certainly we do not contend that *CATCO* and *Hunt* granted the Commission *carte blanche* to impose any and all conditions without a showing that they were appropriate and necessary. We do urge that they sustain, among other things, the Commission's power to impose reasonable conditions designed to guard against the damaging effects of "triggering."

There is nothing in *Hunt* that supports the lower court's conclusion here that any condition in a permanent certificate that might impair the ability of a natural gas company to file and collect (subject to suspension) contractually authorized rate increases invades what the court describes as "the rights of a producer * * * under § 4" of the Act (R. 634). On the contrary, in rejecting similar contentions as to the interrelationship of the rate-changing provisions of Section 4 and the certification provisions of Section 7, this Court stressed, as it previously had in *CATCO* (360 U.S. at 391–392), that the rate-changing pro-

cedures of Section 4 are not a limitation on the Commission's authority under Section 7 to impose appropriate certificate conditions required by public convenience and necessity, and that "[t]he power granted to the Commission in § 4 does not come into play until after the initial certification of the natural gas into interstate commerce has been granted under § 7" (*Hunt, supra,* at 522). The Court, it should be noted, did not talk, in terms of "rights" granted to the producers under Section 4. Indeed, in *United Gas Pipe Line Co.* v. *Mobile Service Corp.*, 350 U.S. 332, 339, it had already made clear that "§ 4(d) [which prescribes the procedure for rate change filings] is simply a prohibition, not a grant of power. * * * The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made" (emphasis in original).

Finally, referring to the legislative history of the 1942 amendments of Section 7 (c) and (e), the Court said in *Hunt* (376 U.S. at 525–526):

> * * * The purpose of the amendments was to give "the Commission an opportunity to scrutinize * * * the characteristics of the rate structure * * * at a time when such vital matters can readily be modified as the public interest may demand. * * *" House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Cong., 1st Sess., 2–3. * * *
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> * * * * *
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> Clearly, the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce. More-

> over, the Commission has long recognized this obligation and has required modification of many tariff and contract provisions as a condition to the granting of a certificate. [Footnote omitted.]

Certainly the escalation provisions of a contract are crucial features of the "rate structure" that the Commission may "scrutinize" and require to "be modified as the public interest may demand * * * as a condition to the granting of a certificate."

If *CATCO* and *Hunt* left any doubt as to the Commission's authority to impose the kind of condition here involved, it was completely removed by the Court's subsequent decision in *Federal Power Commission* v. *Texaco Inc., supra.* That case sustained Commission rules refusing even to accept for filing applications for permanent certificates for contracts containing designated types of indefinite escalation provisions. In terms dispositive of the present issue, the Court, upholding the absolute proscription of any such contractually authorized rate increases, declared (377 U.S. at 42–43):

> * * * Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude; and the legislative history makes clear that its authority reaches that far. * * * [Footnote omitted.]

B. The court below also appears to suggest that the particular conditions in issue here may be invalid because they would "compel the producer to sell gas for nearly ten years at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract" (R. 635). The court's statement, we submit, is inaccurate.

With one exception,[23] the initial contract prices in issue here are at or below the 23.55¢ triggering levels. The Commission ordered only a moratorium on all increases *in excess* of 23.55¢, and then only until July 1, 1967, or the final decision in the area rate proceeding, whichever was earlier. And, of course, the Commission was not imposing a 10-year moratorium. The fact that the producers had voluntarily chosen to operate for approximately six years prior to the Commission's 1963 decision under authorizations that were still subject to judicial review does not affect the reasonableness of the time limit.

This limit must be considered in relation to the circumstances prevailing in 1963 when the present certificates were issued. Certainly as of that time the Commission could properly conclude that the public interest in holding the line pending completion of the Southern Louisiana Area Rate case would suffer from any certification of gas sales which, in the

[23] That one contract called for an initial price of 23.8¢ per Mcf (R. 177, 180). Under the Commission's decision the producer is free to file all but .25¢ of this amount.

interim, could escalate to prices at or above the triggering levels. The only risk attaching to acceptance of the conditioned certificate is that the rate fixed by the area proceeding might exceed 23.55¢, in which event the producers will have lost, during the interim period, the opportunity to collect an amount in excess of that figure. We point out that 23.55¢ is very substantially above the in-line price. We also point to the risks which consumers assume: (1) that the in-line price[24] will turn out to be higher than the just and reasonable price; (2) that allowing producers to file for and operate at a level between the in-line price and 23.55¢ may result in some injury to the public (depending upon the outcome of the area proceeding) because of the inherent defects of the refund procedure. See *Hunt, supra,* p. 37.

C. In its brief in opposition to certiorari (p. 13), ODECO contends that there is no substantial evidentiary support in the record for the Commission's finding that triggering and price redeterminations would result from the filing of rate increases above 23.55¢ per Mcf. However, after the Commission's final order imposing the condition, none of the producers sought, either in petitions for rehearing or by motions to reopen the record, to controvert the Commission's finding in this regard.[25] That being so, no

[24] In a subsequent case, *Union Texas Petroleum*, 32 FPC 254, decided July 23, 1964, the Commission found that the in-line price for gas in Southern Louisiana had remained constant at least through the end of 1962.

[25] In an application for rehearing, ODECO stated that there was "no evidence in the record * * * which pertains to the effect of filing by Odeco of its contractual price increases"

objection to the specific moratorium on filing increases above 23.55¢ per Mcf may now be considered. Section 19(b); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, 650–651.

Thus, the sole question on this aspect of the case is whether it is unreasonable, or arbitrary and capricious, for the Commission to condition producer certificates against the filing of rate increases which might trigger other increases while just and reasonable rates are being determined, with a maximum terminal date of July 1, 1967. We submit that such a condition is reasonable and should be sustained.

(R. 603). But the Commission's finding as to the general triggering effect of any price increase above 23.55¢ per Mcf upon other contracts of the pipeline customers here involved was not attacked and ODECO did not suggest that the filings it was authorized to make would not, in fact, have the results the Commission had stated required the specific limitation.

Significantly, when, in a subsequent case, some of the same producers involved here claimed on rehearing that the 23.55¢ was not the appropriate triggering level because there were some sales in the area being made at still higher levels, the Commission pointed out that many escalation contracts in the area are triggered by increases in less than the entire production area while others permit renegotiation based on prices of sales to three different pipelines in specified areas. In view of those many variations and the ambiguities of many of these provisions, the Commission concluded that the public interest required the fixing of a common moratorium ceiling at the level above which increases could prompt price escalations in the area rather than attempting to set different ceilings for different certificates. See *Union Texas Petroleum, et al.*, Opinion 436–A on Rehearing, issued October 8, 1964, 32 FPC 952.

III. THE COMMISSION PROPERLY REQUIRED REFUNDS, WITH INTEREST, OF ALL AMOUNTS COLLECTED IN EXCESS OF THE INITIAL IN-LINE PRICE

The court below upheld that part of the Commission's order which asserted authority to require refunds for the excess charges collected by the producers during the period when the original certificate authorizations were under review and subsequently, following reversal and remand, when the proper initial price for the gas was being determined. The court concluded, however, that the only proper measure of these refunds was the excess of the amount collected over the price ultimately determined to be the just and reasonable price for the gas—a measure differing from that adopted by the Commission. Before considering the question of the proper measure, we turn to the contention made by ODECO, petitioner in No. 26, that the court erred in holding that the Commission had any authority whatever to order refunds in the present circumstances.

A. THE COMMISSION HAD AUTHORITY TO IMPOSE A REFUND OBLIGATION

Having determined the proper initial price on remand from the courts of appeals, the Commission ordered the producers to refund to their customers[26] the amounts in excess of that price which the producers had theretofore collected under the invalidated certificates originally issued. Rejecting the producers' contention, now urged by ODECO, that the Commission's action amounted to an order for

[26] Provisions were otherwise made for appropriate flow-through of the refunds to the pipelines' customers.

reparations, for which the Gas Act makes no provision, the court below said (R. 638–639):

> * * * It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. * * *

We agree with the proposition, implicit in the court's statement, that the producers acquired no legal or equitable right to collect and retain their contract rates by electing to accept the certificates and commence operations while the certificates authorizing the collection of those rates were being challenged in the courts—challenged on the very ground that the rates were inconsistent with the public convenience and necessity. If the Commission's original certificate orders had not been subjected to judicial review, it is quite true that the Commission, lacking power to grant reparations, could not thereafter have determined retroactively that the initial prices were excessive.[11] But the situation is quite different where an order or judgment under which one party claims rights remains subject to review at the instance of parties adversely affected. It is a familiar principle that "a court will correct what has been wrongfully done by virtue of its process,"

[11] In such circumstances, any re-examination of the rates could be made only in an independent proceeding, with the Commission's order therein having only prospective effect.

Arkadelphia Milling Co. v. *St. Louis S.W. R. Co.*, 249 U.S. 134, 146. The precept is no less applicable where the error laid bare by the court is one which occurred at the administrative level and the agency is called upon to take corrective action ancillary to a remand. Court and agency attain the end "through coordinated action," *United States* v. *Morgan*, 307 U.S. 183, 191. The agency's duty on remand is "retrospectively [to] act as conscientiously within the bounds of the power given [it] by Congress as [it] would have done initially had [it] limited [itself] to [its] authority." *Addison* v. *Holly Hill Products, Inc.*, 322 U.S. 607, 620.

The point is aptly illustrated by the second *Chenery* case (*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194). In sustaining a commission order issued on a prior remand, this Court held (332 U.S. at 200–201):

> When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate [*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80], it was with the thought that the Commission would give full effect to its duties in harmony with the view we had expressed. * * * The fact that the Commission had committed a legal error in its first disposition of the case certainly gave Federal's management no vested right to receive the benefits of such an order. * * * After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. It was again charged with the duty of measuring the pro-

> posed treatment of the management's preferred stock holdings by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated. * * *

The Court proceeded to sustain the commission's order despite the fact that it operated "retroactively" to prevent the realization of the anticipated profits which had motivated the original transaction (332 U.S. 203–204).[28]

The very course adopted in the instant case was followed by the Commission on the *CATCO* remand. There, it explained the difference between a refund order of the type here involved and an award of reparations as follows (27 FPC at 596):

> * * * We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public

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[28] See, also, *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 280 F. 2d 636, 640 (C.A.D.C.), certiorari denied, 364 U.S. 870, where the court of appeals said:

"Nor do we agree with Delta's claim that it emerged from the former review with a legitimate expectation that the rate would not be reopened. True, the Supreme Court has held that mailpay rates, like railroad freight rates, once final, cannot be reopened. * * * But here the rate order was not final. We set it aside and remanded the case to the Board for further proceedings. Rather than supporting Delta's contention, we think that [*Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, and *Transcontinental & Western Air* v. *Civil Aeronautics Board*, 336 U.S. 601, 608] support the view, at least by implication, that the Board has power to re-examine *non*-final rates."

Cf. *Public Service Commission of New York* v. *Federal Power Commission* (*Skelly*), *supra*, 329 F. 2d at 249; *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687, 689–690 (C.A. 5).

convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court.

ODECO's petition for certiorari (No. 26) suggests, however, that it would be inequitable to require refunds as to sales initiated "in reliance on" the original certificates. The fact is that, by initiating service while the certificates were still subject to review and possible modification, the producers assumed the risk that the consumer interests might be successful in their attempt to secure lower initial prices. Even in 1959, when the Commission issued the ill-fated unconditioned certificates, it warned that "it is the applicant which at least runs the risk of failing to substantiate the proposed price" (R. 53).

All of the contracts here involved, we note additionally, contained escape clauses. For example, the contract between J. Ray McDermott & Co., Inc., and Hope Natural Gas Co. provided for cancellation "in the event either party does not obtain a *final and non-appealable certificate* from the Commission on or before April 1, 1959, which is satisfactory to the party applying for the same" (R. 75; emphasis supplied). None of the producers made any attempt to defer initiation of sales until after they had received "final and non-appealable" certificates, undoubtedly because they believed the risks resulting from a delay in the commencement of service outweighed the risk that the contract price might be held to have been too high. In the circumstances, it cannot reasonably be contended that it is "inequi-

table" to require them to make refunds for the period in which they sold their gas at prices above those properly determined to be in the public interest.

Assuming that the reversal and remand worked some hardships, the risks were not unpredictable, and "the agency is the primary tribunal to balance these hardships against the public interest," *Delta Airlines Inc.* v. *Civil Aeronautics Board, supra,* 280 F. 2d at 641.

B. THE COMMISSION PROPERLY FIXED THE MEASURE OF REFUNDS AS THE AMOUNT THE PRODUCERS HAD CHARGED IN EXCESS OF THE APPROPRIATE INITIAL PRICE

As indicated above, having found that the producers had been charging higher prices than the proper in-line price during the period prior to certification pursuant to the decision now under review, the Commission ordered them to refund the difference to their customers. The court below concluded, however, that the only appropriate measure of respondents' refund obligations was the difference between what they had been collecting prior to the present certification and the price which might subsequently be determined, in a rate proceeding, to be just and reasonable. We believe that the court exceeded its powers in thus substituting its judgment for that of the Commission as to the proper measure of the refunds.

To the extent that the court's determination is based upon its assumption (R. 640) that no consumer is entitled under the statute to gas at a rate less than what is "just and reasonable" and "[n]oth-

ing in the law should encourage that result or its possibility," we believe that the ruling results from the court's misunderstanding of the statutory scheme, which we have discussed at some length in points I and II, *supra*. There is nothing in the Act which guarantees a producer the right to file for and collect what he asserts is a "just and reasonable" rate in circumstances where the Commission, in the exercise of its certificate power under Section 7 of the Act, has a basis for concluding that collection of such a rate is not consistent with the public convenience and necessity. To illustrate: The price at which the Commission authorizes a producer to commence operation pursuant to a temporary authorization under Section 7(c) might turn out to be below the "just and reasonable" rate subsequently set for such gas, but, as this Court held in *Hunt*, the Commission can nevertheless conclude that it is contrary to public convenience and necessity for the producer to file for and collect any higher rate prior to permanent certification. So here, the Commission can conclude that commencing service at more than the in-line price or charging more than a triggering price is contrary to the public convenience and necessity until the just and reasonable producer rates are determined. The short of it is that a producer has no "right" to operate except under a valid certificate and the standard for certification is the public convenience and necessity, which is not necessarily the same as whether the rates are or may be "just and reasonable."

The court of appeals suggests that if the Commission had issued certificates at the proper in-line price

in the first instance, there would have been no barrier to increased-rate filings (at least up to 23.55¢, and higher if the moratorium is invalid). Such increases, the court recognizes, would inevitably have been suspended and allowed to go into effect subject to refund. The amount of refunds, in that circumstance, would have been calculated on the basis of the difference between the price charged and the just and reasonable price subsequently determined. Accordingly, the court reasons, in order to achieve the situation which would have prevailed had the Commission fixed the proper initial price in the first instance, a similar refund standard should be applied here.

Assuming, *arguendo,* that it would have been permissible for the Commission to adopt this approach, there are a number of factors, overlooked by the court below, which fully warranted a different determination. In the first place, the court's proposed standard would completely deprive consumers of the benefits of the statutory thirty-day notice and the five-month suspension period, a not inconsequential matter in view of the wide spread between the initial price and the contract prices involved here.

Moreover, even assuming that this defect could be cured by providing that refunds should be measured by just and reasonable rates only for the period after the first six months of operation, there are additional reasons why the Commission reached a different conclusion. The lower court's approach operates on the assumption that the just and reasonable price will inevitably be above the in-line price. But this is not

necessarily true. If events proved otherwise, the effect of the court's standard would not be to place the producer in the position he would have been in if he had been certificated at the proper initial price in the first instance but to leave him substantially worse off. As a consequence, under the ruling below, there could be no certainty as to the eventual price the producer would secure for the period of operation prior to permanent certification, and the serious problems of royalty and tax payments referred to above (p. 18) would be unnecessarily compounded. In short, the main value, from the producers' standpoint, of fixing a firm initial price in a permanent certificate would be significantly lessened. See *supra*, pp. 17–18.

The other side of the coin is equally significant. Under the lower court's test, the consumers will be deprived of immediate refunds. This is important, for while the refund remedy is inadequate at best, its value in making the actual customers who have paid overcharges whole will vary inversely with the delay in its effectuation. Thus, if consumers in the present case must wait not only until the permanent certificates are issued but for still another indefinite period before they can hope to benefit from the courts' correction of the Commission's original error in permitting initial prices at levels equal to or higher than those this Court repudiated in *CATCO*, it is clear that, as a practical matter, they will be deprived of much of the fruit of their victory.

It is true, of course, that correction of agency errors in decisions upon which parties have in fact chosen to rely before they were final and unreview-

able will frequently cause some hardship to the parties who relied. See *Securities and Exchange Commission* v. *Chenery Corp.* and *Delta Air Lines, Inc.* v. *Civil Aeronautics Board, supra,* pp. 48–49. There is no means of achieving a perfect restoration of the the situation that would have prevailed absent the original error. A very persuasive consideration, therefore, is that the respondents in this case speculated upon the validity of certificates issued at prices which, as they were well aware, were in all cases substantially higher than those for which the consumer interests were contending, and which in all but one case were significantly higher than the price that had just been set aside by this Court in *CATCO.* If they had prevailed in the earlier appellate proceedings they would have had unconditioned certificates at these very high prices without any refund obligation, no matter how much lower the just and reasonable price might subsequently turn out to be. Having lost, they cannot complain because they may now find themselves in a worse position than if they had initially accepted certificates at a lower, non-controversial price and subsequently filed increases made effective subject to refund.

C. THE COMMISSION MADE A REASONABLE DETERMINATION AS TO THE RATE OF INTEREST PAYABLE IN CONNECTION WITH THE REFUNDS

Since the court below did not sustain the Commission's refund order, it declined to pass on the subsidiary objection raised by the producers to the Commission's requirement that the producers pay interest on the refunds in the amount of 6% until March 1,

1960, and 7% thereafter (R. 640). For the same reasons that we have advanced in urging this Court to consider the Commission's specific determination of the proper in-line price (*supra*, pp. 28–29), we urge the Court to examine the refund order *in toto* rather than leave the minor issue of interest unsettled.

The Commission's reconsideration of these cases pursuant to the legal principles enunciated by the courts eventuated in a holding that the pipelines, and through them the consumers, had paid the producers money to which the latter were not lawfully entitled. In short, the consumers have been improperly deprived of the use of their money and the producers have enjoyed the benefit of its use. A requirement for the payment of interest is therefore necessary in order to make the purchasers whole, prevent unjust enrichment, and effectuate the purposes of the Act. *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157 (C.A. 5); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F. 2d 919, 927 (C.A.D.C.), certiorari denied, 365 U.S. 827. In *Texaco* the Fifth Circuit sustained a Commission order for the payment of interest on refunds required as to operations conducted under a temporary authorization. Chief Judge Tuttle there said (290 F. 2d at 157):

> * * * the Commission was fully authorized, when ordering a refund under the terms of the condition, to require payment of interest at 6 percent. * * * Any other holding would, it seems to us, validate a retention of funds by the producer in a manner that would amount to unjust enrichment.

The present refund order is, in this respect, analogous to an N.L.R.B. back pay order. Several courts of appeals have uniformly sustained the Labor Board's newly adopted policy of requiring interest in such cases. *E.g., Philip Carey Manufacturing Company* v. *National Labor Relations Board,* 331 F. 2d 720 (C.A. 6), certiorari denied, 379 U.S. 888; *Marshfield Steel Co.* v. *National Labor Relations Board,* 324 F. 2d 333 (C.A. 8); *Revere Copper and Brass, Inc.* v. *National Labor Relations Board,* 324 F. 2d 132 (C.A. 7); *National Labor Relations Board* v. *Globe Products Corp.,* 322 F. 2d 694 (C.A. 4); *International Brotherhood of Operative Potters* v. *National Labor Relations Board,* 320 F. 2d 757, 760–761 (C.A.D.C.); and *Reserve Supply Corp. of L.I.* v. *National Labor Relations Board,* 317 F. 2d 785, 789 (C.A. 2).

There is no basis for the suggestion made by one of the producers in the court below that the Commission was required to adopt state law in prescribing interest as an incident to effectuating a federal statute. Cf. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 296:

> * * * In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. * * *

While the Court there was speaking of a contractual obligation to the United States, the rule is no less applicable to the present case, which, in essence, in-

volves a quasi-contractual obligation due the Commission under a "plenary trusteeship" for the purchasers. *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609, 612 (C.A. 8), certiorari denied, 314 U.S. 696. See, also, *United States* v. *Philmac Mfg. Co.*, 192 F. 2d 517, 519 (C.A. 3), and *Reserve Supply Corp. of L.I.* v. *National Labor Relations Board*, *supra*, 317 F. 2d at 789 n. 7.

In increasing its standard requirement from 6% to 7% on March 1, 1960, the Commission stated (Order No. 215A, 25 Fed. Reg. 1943, 23 FPC 474, 475):

> The Commission has determined that in view of the current cost of money now available for borrowing by natural gas companies, the interest payable on increased rates collected by both producers and pipeline companies subject to refund pursuant to the Act should be adjusted more in line with present commercial practices. * * *

None of the producers alleged or sought to prove that the Commission has misread "present commercial practices" or that the increase from 6% to 7% was not reasonably adapted to effectuating the purposes of the Act. We submit that, on the present record, it cannot be said that the current requirement of 7% interest is improper. In fact, in its orders granting stays in some of the present cases (*McDermott*, No. 20967; *ODECO*, No. 20989; *Kilroy*, No. 21029),[29] the court below expressly required 7%

[29] The *Kilroy* petition was withdrawn before the cases were decided below.

interest on refunds which may be required for the period of the stay if the Commission's order is sustained.

CONCLUSION

In conclusion, a word should be said concerning the court's statement (R. 640, n. 56) that—

> * * * As a precedent, our ruling is something less than the specter supposed, since the Commission and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. * * *

In our view, the court of appeals has underestimated the serious and continuing problem of interim control to which the Commission and this Court in the second *Phillips* case (*Wisconsin* v. *Federal Power Commission, supra,* 373 U.S. 294) have given such careful consideration. While the Commission has now issued its decision in the first area rate proceeding,[30] it would be unfortunate indeed to operate on the assumption that a viable system of interim price control is no longer of significance. Even with the most strenuous effort by all concerned, the ultimate rate determinations in many other geographic areas will necessarily be delayed by the procedural requirements of final administrative decision and judicial review in the several area rate proceedings. Meanwhile, gas is being sold in the interstate market and consumers are entitled to protection. Other cases pending before the Commission and the courts involve

[30] *Permian Basin Area Rate Proceeding*, Docket No. AR61–1, Opinion No. 468, issued August 5, 1965.

the problem of interim controls. In the aggregate, very substantial quantities of gas and large sums of money are at stake.

The three certificate conditions here involved—*i.e.* the imposition of an "in line" initial price, a partial moratorium or price increases, and a requirement of refund where amounts in excess of the proper initial price are collected—reflect a coordinated plan to hold the line on prices while just and reasonable rates are being determined. This Court's decisions support the present Commission order as a valid and reasonable method of providing, for this interim period, the "effective bond of protection from excessive rates and charges" to which consumers are entitled.

For the foregoing reasons, the judgment of the court below should be reversed and the Commission's order affirmed.

Respectfully submitted.

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AUGUST 1965.

APPENDIX A

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, are as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate

to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * * * *

SEC. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest

was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

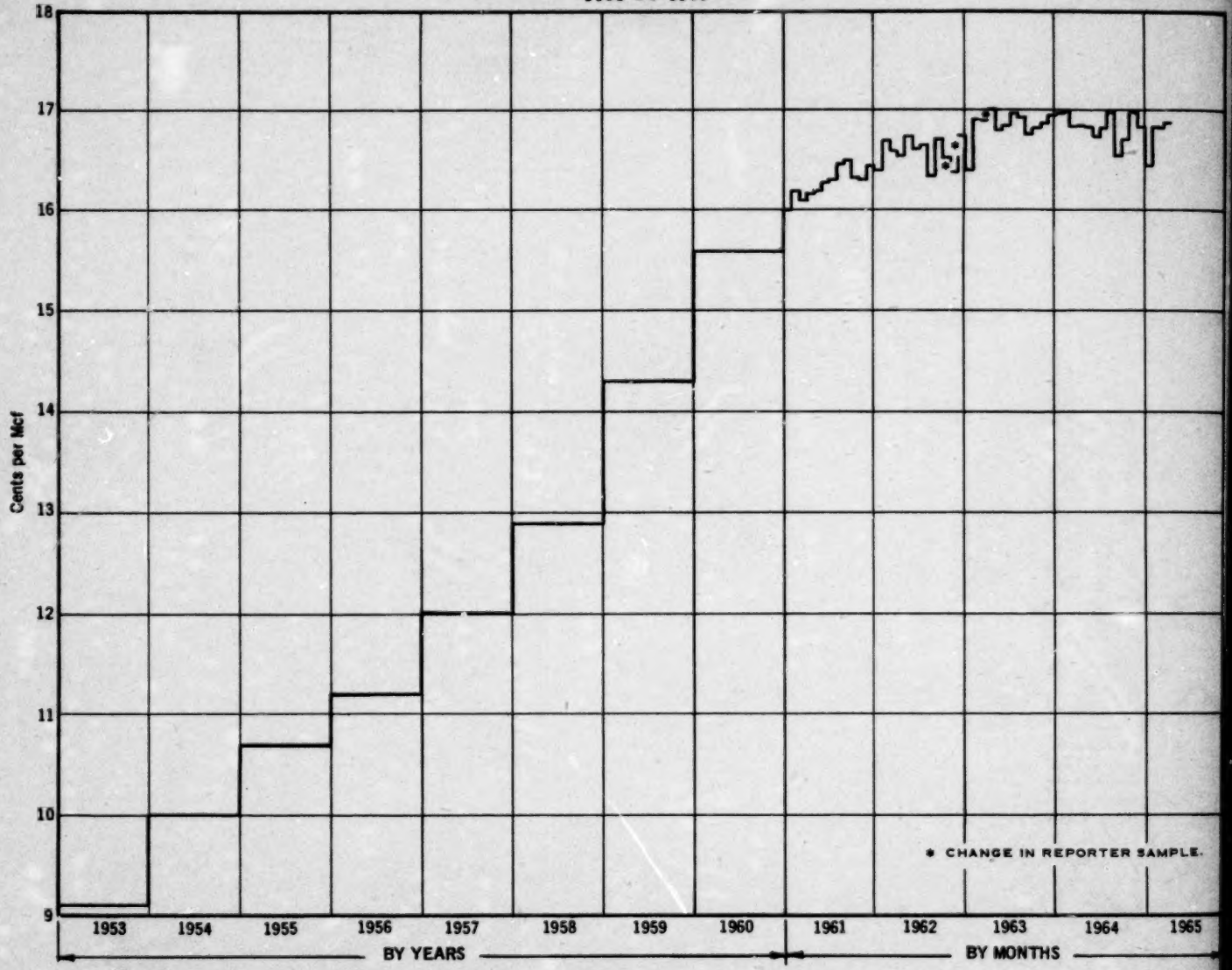
SEC. 7(e) Except in the case governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by

the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

U.S. GOVERNMENT PRINTING OFFICE: 1965

APPENDIX B

FIELD PRICES OF NATURAL GAS
BY PRODUCERS OF PIPELINE COMPANIES
1953 TO 1965



SOURCE: 1961-1965: MONTHLY RELEASE - WHOLESALE PRICES AND PRICE INDEXES, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS COMMODITY CODE NO. 0531-01.03.
1953-1960: COMPILED FROM ANNUAL REPORTS TO THE FEDERAL POWER COMMISSION, FPC FORM NO. 2.